No. 83-751

In the Supreme Court of the United States

OCTOBER TERM, 1983

SECURITIES AND EXCHANGE COMMISSION, ET AL.,
PETITIONERS

v.

JERRY T. O'BRIEN, INC., ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS HARRY F. MAGNUSON AND H. F. MAGNUSON & COMPANY

WITHERSPOON, KELLEY, DAVENPORT
& TOOLE, P.S.

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QUESTION PRESENTED

Whether a known target of a Securities and Exchange investigation should be given notice of administrative subpoenas issued to third parties during such an investigation, particularly under the circumstances of this case.

PARTIES TO THE PROCEEDING

Petitioners (who were defendants and cross-defendants in the District Court and appellees in the Court of Appeals) are the Securities and Exchange Commission and Jack H. Bookey, Lane B. Emory and George N. Prince, employees of the Commission's Seattle Regional Office. They are hereinafter referred to as "SEC".

Respondents Jerry T. O'Brien, Inc., d/b/a Pennaluna & Co., Jerry T. O'Brien; Benjamin A. Harrison, and Pennaluna & Co., Inc. were plaintiffs in the District Court and appellants in the Court of Appeals. They are hereinafter referred to as "O'Brien". Respondents Harry F. Magnuson (hereinafter "Magnuson" and H. F. Magnuson & Co. (hereinafter "HFM & Co.") were defendants and cross-plaintiffs in the District Court and appellants in the Court of Appeals.

Respondent Magnuson is a certified public accountant who resides in Wallace, Idaho. Respondent HFM & Co. is a certified public accounting firm with offices in Coeur d'Alene, Kellogg, and Wallace, Idaho.

Respondent O'Brien is a resident of Kootenai County, Idaho and is the sole owner of J. T. O'Brien, Inc., d/b/a Pennaluna & Co., a registered broker-dealer. J. T. O'Brien, Inc. is incorporated under the laws of the State of Idaho and has its principal place of business in Wallace, Idaho. Respondent Harrison is an employee of O'Brien, Inc. and resides in Spokane, Washington. Respondent Pennaluna & Co., Inc., is incorporated under the laws of the State of Idaho and has its principal place of business in Spokane, Washington.

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Respondents, Magnuson[1] and HFM & Co., hereby submit their brief in support of the decision of the United States Court of Appeals for the Ninth Circuit in this case.

I

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 704 F.2d 1065 (*See Pet. App. 1a-8a* where the opinion is set forth). The opinions of the District Court are not reported (*See Pet. App. 9a-16a, 17a-24a* where the opinions are set forth).

II

JURISDICTION

The decision of the Court of Appeals was entered on April 25, 1983. The SEC's petition for rehearing was denied on September 30, 1983 *(Pet. App. 25a.)* The SEC petitioned for a writ of certiorari on November 4, 1983, which petition was granted on January 9, 1984. The SEC invokes jurisdiction of this Court under 28 U.S.C. §1254(1).

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[1] Magnuson is a graduate of the University of Idaho and the Harvard Graduate School of Business. Active in community and philanthropic affairs, Magnuson serves as Chairman of the Board of Trustees of Gonzaga University; as Vice-Chairman of the Board of Trustees of the Washington State University Foundation; as Chairman of the Board of Trustees of Idaho State University Foundation; as a member of the President's Council, Washington State University; as Chairman of the Idaho State University Business School Advisory Council; as well as chairman or member of many other educational or philanthropic organizations. Magnuson is past President of the Wallace, Idaho Chamber of Commerce; past Director of the Idaho State Chamber of Commerce; past Chairman of the Board of Regents of Gonzaga University; and past member of the Executive Board, Boy Scouts of America. He has served as a board member of the Idaho Mining Association, Northwest Mining Association, and the Western States Governor's Mining Advisory Council. He has also served on the Board of Trustees of Holy Names College Foundation and on the Board of Regents of Fort Wright College. Magnuson is a director of various businesses, including the General Telephone Company of the Northwest. He is the recipient of the Distinguished Alumnus Award from Idaho State University and will in May, 1984, receive an honorary Doctor of Laws degree from Gonzaga University.

III

STATUTORY PROVISIONS INVOLVED

Petitioners SEC have adequately described the statutory provisions involved in this matter.

IV

STATEMENT OF THE CASE

A. Summary of the Case.

1. *Respondents' Complaints.*

The Magnuson respondents are the named targets[2] of an SEC Formal Order of Investigation (hereinafter "FOI"). The FOI was issued in September 1980 and authorized the investigation into specific transactions of Magnuson involving five (5) named mining companies to determine whether there were violations of the Securities Act of 1933, 15 U.S.C. §77(a) *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. §78(a) *et seq.*

An FOI launches the formal investigation, defines its scope, and establishes the outer limits beyond which the SEC investigative staff may not issue process. *See SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1023 (D.C. Cir. 1978).[3]

Notwithstanding that SEC subpoena power is limited to the transactions and dates framed by the FOI, the SEC served scores of subpoenas duces tecum upon Magnuson and third parties which, because they sought information and documents far beyond the scope of the FOI, were abusive. *R 102, Ex. D-X.*

After they learned of the existence of the investigation,

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[2] A person whose conduct is under investigation is commonly called a "target" of the investigation. *See, e.g., United States v. Baggot*, ___ U.S. ___, 77 L. Ed. 2d 785 (1983). With respect to any particular target, a third party is any other person or entity.

[3] The SEC recognizes the authority to issue subpoenas is limited to that power conferred by the Formal Order of Investigation which authorizes "use of subpoenas by designated staff members in investigating particular transactions." *Brief Pet., p. 12-13.*

Magnuson and O'Brien filed papers in District Court seeking to limit the SEC administrative subpoenas to testimony and documents within the scope of the FOI and to enjoin SEC conduct of the investigation in bad faith. *R 1, R 26.* Magnuson did not then nor does he now seek to enjoin the entire investigation—just that part conducted outside the scope of the FOI and, thus, outside applicable statutory authority and contrary to judicial decisions construing that authority. *R 1, R 26.*

In substance, Magnuson and O'Brien sought to enjoin the enforcement of SEC administrative subpoenas not meeting the good faith requirements of *United States v. Powell,* 379 U.S. 48 (1964) as to legitimacy of purpose and relevancy to that purpose of the information and documents obtained by the subpoenas.

2. *District Court.*

The SEC moved to dismiss under FRCP Rule 12 claiming that respondents had an adequate remedy at law in the event that the SEC chose to bring a subpoena enforcement action.[4]

The SEC argued that respondents had the right to decline response to the SEC administrative subpoenas issued to respondents and that the SEC would then be required to bring a subpoena enforcement action in District Court to compel testimony and production of documents. The SEC further argued that respondents would have a full opportunity to challenge the SEC subpoenas in such a hearing.

The District Court initially agreed with the SEC's argument and dismissed the equitable claims of respondents, *R 61 (Pet. App. 17a-24a)* concluding that the respondents had an adequate remedy at law because they could challenge the abusive administrative subpoenas at a subsequent subpoena-enforcement hearing. *R 61.*

Following entry of the Court's order, the SEC deferred bringing a subpoena-enforcement action against respon-

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[4] The case was before the District Court and the Ninth Circuit on the SEC's motion to dismiss under FRCP Rule 12. Consequently, all factual allegations of respondents were deemed true.

dents in order to circumvent respondents' opportunity to object to the overly broad subpoenas. Instead, it "waged an aggressive investigation, issuing numerous subpoenas in the Spokane area to various mining companies and brokers" *(Pet. App. 10a)*. Many of the subpoenas issued to these and other third parties sought the very same information and documents which the SEC had previously sought directly from respondents and to which respondents had objected.

Thus, respondents renewed their request for equitable relief to the District Court to ensure that their remedy at law, *i.e.*, a subpoena enforcement hearing, would not be emasculated by a tactical "end run" *(Pet App. 10a)*. In doing so, respondents requested they receive notice of administrative subpoenas issued by the SEC to third parties. *R 101*. Such notice would enable respondents to challenge unlawful or unauthorized subpoenas to third persons.

The District Court denied the request for notice although it noted that "the argument is not without appeal" *(Pet. App. 11a)*. It did so on the grounds that the respondents lacked standing and had an alternative legal remedy besides notice of third-party subpoenas. The suggested alternative remedy was to suppress information obtained through abusive third-party subpoenas in any later proceeding against them. The District Court never reached the merits of respondents' allegations that the SEC subpoenas to third parties were issued in bad faith.

3. *Ninth Circuit.*

The Ninth Circuit agreed with the District Court's dismissal of respondents' equitable claims as they applied to subpoenas issued to the respondents themselves as "targets" of the investigation since an adequate legal remedy (*i.e.*, a subpoena enforcement hearing) existed *(Pet. App. 4a)*. However, the appellate court held that, without notice of subpoenas issued to third-party witnesses in the investigation, respondents had no adequate legal remedy to test their allegations of SEC bad faith and unauthorized conduct as applied to the third-party subpoenas *(Pet. App. 4a-8a)*. Thus, the appellate court, to assure that an adequate legal remedy existed with respect to third-party subpoenas, ordered that notice of such subpoenas be given. Because the District

Court had not ordered notice, the Ninth Circuit reversed that part of the District Court's order and remanded.

B. The SEC Investigation.

1. *Issuance of the FOI.*

Congress has granted the SEC "limited authority" to undertake investigations. *United States v. Sells Engineering, Inc.*, ___ U.S. ___, 77 L. Ed.2d 743 (1983). The SEC may exercise its authority only in compliance with statutory standards and judicial decisions. *United States v. Powell*, 379 U.S. 48 (1964).

Congress has authorized the SEC to investigate alleged violations of the securities laws of the United States without the need or use of subpoenas. 15 U.S.C. §§77s(b), 78u(a). In addition, Congress has authorized the SEC to use subpoenas in aid of its investigative function. However, officers of the SEC may issue agency subpoenas only after an FOI is issued by the Securities and Exchange Commission (the "Commission") itself. 15 U.S.C. §§77s(b), 78u(b). When an FOI is issued, the Commission, consistent with the Congressionally-mandated scheme, authorizes named officers of the SEC to use subpoena power to "investigate particular transactions" which are the subject matter of the FOI.[5]

The SEC, through its Seattle Regional Office, began the subject investigation of Magnuson in 1978 *(Depo. Prince, p. 61, R 172)*. On September 3, 1980, the Commission entered its Order of Formal Investigation, *R 1, Ex. A*, styled "In the Matter of H.F. Magnuson & Company." It granted limited subpoena power to certain SEC attorneys and staff in the investigation of specific Magnuson transactions.

2. *Scope of Investigation Authorized by the FOI.*

Because the FOI issued on September 3, 1980, defines the scope in which the SEC may use compulsory process in its

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[5] The SEC concedes that an FOI authorizing the use of subpoenas also limits their use to investigation of specific transactions. Brief Pet., p. 12-13.

investigation, it is important to analyze the limits of the FOI.

The FOI authorized certain SEC attorneys and staff members (the "SEC officers") to investigate a limited number of Magnuson transactions. First, the FOI authorized SEC officers to investigate whether Magnuson and certain named others had previously bought and sold stock of a single named mining company (Hecla Mining Company) on the basis of nonpublic or insider information. *R 1, Ex. A ¶I B.*

Second, the FOI authorized SEC officers to investigate whether Magnuson previously was the beneficial owner of more than ten percent of the common stock of four named mining companies (Clayton Silver Mines, Inc., Metropolitan Mines Corporation Limited, Silver Dollar Mining Company and Sunshine Consolidated, Inc.) and, if so, whether he had made complete disclosures and filings concerning his ownership. *R 1, Ex. A ¶I C.*

Third, the FOI authorized investigation concerning whether Magnuson previously had acquired beneficial ownership of equity securities of the same four named mining companies and, if so, whether they had failed to make disclosures and appropriate filings of the same as required under §§13(d) and 13(g) of the 1934 Act. *R 1, Ex. A ¶I D.*

Finally, the FOI stated that a subject of investigation was whether Magnuson and other named persons had previously offered to sell and had sold stock in three named companies (Clayton Silver Mines, Inc., Metropolitan Mines Corporation Limited and Sunshine Consolidated, Inc.) in violation of the anti-fraud provisions of the Securities Act of 1933. *R 1, Ex. A ¶I F, G, H.*

3. *SEC Use of Subpoenas Greatly Exceeds the Scope of the FOI.*

Even though the FOI is very particular and limited, as set forth above, subpoenas have been issued by the SEC to third parties requiring testimony and production of documents in unrelated transactions in the securities of dozens of companies other than those few named in the FOI, including

transactions occurring more than a year after the issuance of the FOI. In summary, the SEC has issued subpoenas under the auspices of the September 3, 1980, FOI seeking to investigate transactions and persons not mentioned in the FOI, violations not alleged in the FOI, and events which did not even take place until years after the FOI was issued. *See* discussion at p. 10, *infra*. Respondents submit that such conduct constitutes bad faith proscribed by *Powell*.

a. Subpoenas Directed to Magnuson.

Without informing Magnuson or any of the other respondents herein or any other target of the investigation that an investigation was being conducted or that the FOI had been issued by the Commission, certain SEC officers proceeded to subpoena various records and documents and take testimony from various third-party witnesses. As of this date the SEC has issued at least sixty subpoenas duces tecum directed to various witnesses. *See, e.g., R 102, Ex. D-X.*

Magnuson was not aware of the existence of the investigation until July 1981, ten months after issuance of the FOI and three years after the investigation actually started, when he received various subpoenas duces tecum addressed to him calling for production of a broad category of records. Magnuson notified the SEC that he would not voluntarily comply with the subpoenas because they sought documents not authorized by the FOI. In this connection it is interesting to note that throughout the pendency of this investigation, the SEC never asked to talk with Magnuson or any other target about any matter under investigation, and has not to this day.

b. The SEC Has Continually Refused to Recognize the Confidentiality of the Investigation.

Copies of the FOI, a nonpublic and confidential document, were furnished or shown by the SEC to numerous persons, including clients of HFM & Co. and persons with whom Magnuson does business *(Depo. Prince, p. 73, R 172)*, even though the investigation was to be conducted on a private,

nonpublic and confidential basis under the SEC's own rules and the terms of the FOI itself, and even though no wrongdoing is alleged in the FOI to have been committed by HFM & Co.

c. SEC Participated in Leaking the Fact and Scope of the Investigation to News Media.

Ignoring the private and confidential nature of the investigation, the SEC leaked to the public that an investigation of Magnuson and O'Brien was being conducted and disclosed every detail and aspect of the investigation in a manner calculated to injure, defame and cause embarrassment to Magnuson.

As a result of the leak, a news article appeared in the *Kellogg* (Idaho) *Evening News* on July 22, 1981, which revealed that the SEC was investigating Magnuson. *R 1, Ex. K*. The news article described the FOI in detail and went on to discuss the matters under investigation. Petitioner Bookey of the SEC was even quoted as saying in the article "We don't comment on an investigation in progress," thus confirming the investigation's existence.

Similar newspaper articles also appeared in the Spokane, Washington newspapers on July 23, 1981.[6]

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[6] In February 1981, Sunshine Mining Company announced its intention to make a tender offer for the shares of three mining companies of which Magnuson was an officer, director and/or a substantial shareholder. The take-over attempt was met with vigorous opposition by the three companies and Magnuson in the courts and before the shareholders. During July 1981, Sunshine Mining Company formally made its tender offer to the shareholders of the three companies and the three companies made competing cash tender offers for each other's shares. During this important time when the take-over battle was being carried on before the shareholders of the three companies the SEC, through representatives of its Seattle Regional Office, actively participated in the leak of detailed information concerning the private investigation of Magnuson to the newspapers. The leak was arranged by the SEC with the cooperation of a representative of Sunshine Mining Company, known to the SEC to be a professional journalist with numerous newspaper contacts; the SEC gave him the opportunity to read and memorize the FOI and suggested that he handle the leak of the investigation to the news media. *See Depo. Bond, pp. 49-53, 45-46, R 213.*

d. SEC Staff has Been Deceptive in Obtaining Information.

In its conduct of the investigation, the SEC issued several subpoenas to O'Brien. O'Brien was not named in the FOI as a target of the investigation. His counsel had been told by the SEC that O'Brien was not a target of the investigation. O'Brien therefore voluntarily complied with several subpoenas issued by the SEC for purposes of this investigation. *R 2.*

After extensive production by O'Brien to the SEC in response to various subpoenas and after multiple reviews by SEC personnel of documents maintained at O'Brien's office,[7] counsel for O'Brien was belatedly informed by the SEC in August 1981, that in fact O'Brien *was* a target of the investigation.[8] *R 2.*

e. SEC Fishing Expedition Conducted Through Third-Party Subpoenas.

Through the use of subpoenas duces tecum directed to third parties, the SEC set out to conduct and has conducted a fishing expedition into transactions and persons unrelated in scope and time to the matters under investigation pursuant to the terms of the FOI.[9] The FOI was issued by the SEC on September 3, 1980, and by its terms authorized a private investigation of the ownership of and transactions effected by two individuals (including Magnuson) and six

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[7] In fact, the SEC included one of Magnuson's lawyers in the list of names to be checked for trading activity in records subpoenaed from O'Brien. Tr. *38, R 162.*

[8] One federal court has clearly stated that fraud, deceit or trickery are grounds for denying enforcement of SEC subpoenas since such activity amounts to abuse of process. *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310 (5th Cir. 1981). "We think it clearly improper for a government agent to gain access to records . . . by invoking the private individual's trust in his government, only to betray that trust." *Id.* at 316.

[9] It is interesting to note that on no occasion before the District Court or the Ninth Circuit, by brief or in oral argument, has the SEC denied that its third-party subpoenas are beyond the scope of the particular transactions being investigated under the FOI.

corporations in the stock of five mining companies, four of which are among the named targets of the investigation. According to the FOI, the matters under investigation related to purchases and sales of the stock of the five mining companies which took place at some time since before January 1, 1977, and September 3, 1980, the date of the FOI.

Armed with the FOI, representatives of the Seattle Regional Office of the SEC mounted an aggressive campaign issuing over sixty subpoenas duces tecum to brokerage firms, banks, individuals and other mining companies.[10] In practically every instance, these subpoenas sought to obtain records and documents relating to the ownership of and transactions effected by the targets and persons other than the targets, in securities other than those of the five mining companies named in the FOI during periods of time not covered by the FOI, with the obvious expectation of turning up violations totally unrelated to those comtemplated by the FOI. As an example, on July 2, 1981, the SEC issued subpoenas duces tecum to Golconda Mining Company, Silver Buckle Mining Company, Center Star Gold Mines, Inc., Vindicator Silver-Lead Mining Company, St. Elmo Silver Mines Corporation and Rock Creek Mining Company. *See R 102, Ex. H, I, J, L, M and N.* None of these companies is the issuer of any security described or mentioned in the FOI, nor are any of these companies described or mentioned in the FOI as a target of the investigation. Even though the aforementioned companies lack any connection with the FOI, the July 2, 1981, subpoenas sought *all* of the companies' corporate records, stockholder and stock transfer records, and *all* accounting records, banking records, certificate of deposit records, security transaction records, loan records and income tax records from January 1, 1978, through July 2, 1981, and, in most instances, all correspondence with Magnuson

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[10] The exact number of third-party subpoenas issued by the SEC is not known to the respondents because the SEC has refused to give notice thereof. The third-party subpoenas included in the record on appeal represent only a fraction of the total subpoenas issued at the time of the District Court proceedings. Respondents have since learned that the SEC continued to issue other third-party subpoenas following the District Court proceedings which, if in the record, would likely serve as even better evidence of the SEC's abuse of its subpoena authority.

since January 1, 1978, concerning *any* securities transactions or billings for services rendered by HFM & Co.

Similarily, in another example of the clear abuse of its subpoena power under the FOI, the SEC, on May 15, June 12, and June 17, 1981, issued subpoenas duces tecum to several brokerage firms under authority of the FOI. *See R 102, Ex. D through G.* These subpoenas requested essentially all of the brokerage firms' records in transactions effected by Magnuson and his entire family (and in some cases, every customer of the firm) in the securities of eighteen different companies, only three of which are even mentioned in the FOI.

The SEC has also used the FOI as a springboard to investigate a tender offer made by Sunshine Mining Company (not named in the FOI) for the shares of three other mining companies in which Magnuson held interests, which tender offer was not even initiated until six months after the date of the FOI. *See R 102, Ex. U and V.*

Clearly, these subpoenas were not authorized by the FOI nor were they motivated by any good faith desire of the SEC officers named in the FOI to carry out the private investigation authorized by the FOI. Rather, Magnuson suspects, and has asserted in the District Court proceedings, that the barrage of third-party subpoenas launched by the SEC was motivated by an overwhelming desire to "hang something on Magnuson", whether contemplated by the FOI or not, and to do so in a manner that deprives Magnuson of his rights to object to the SEC's abuse of its investigative authority.

C. Litigation in District Court.

Action below was initiated on September 9, 1981, by O'Brien against the SEC and Magnuson in the United States District Court for the Eastern District of Washington. *Complaint R 1.* O'Brien sought to enjoin the SEC from violation of his statutory rights, *i.e.*, from issuing subpoenas to investigate transactions and events outside of the scope of the FOI issued by the Commission. O'Brien further sought to prevent the SEC from acting in bad faith in the conduct of the investigation.

O'Brien requested that HFM & Co be enjoined from production of certain of O'Brien's documents in its possession as accountant for O'Brien pursuant to an SEC subpoena served

upon HFM & Co for production of such documents. *R 1.*

Thereafter, on September 25, 1981, *R 26,* Magnuson filed a cross claim and third party complaint against the SEC and a third party complaint against three employees of the SEC, seeking equitable and legal relief against the SEC and its employees. Magnuson similarly sought to prevent the SEC from issuing compulsory process beyond the authority granted it by the FOI and thus without statutory authority.

1. *District Court Order of January 20, 1982.*

Shortly after the commencement of the litigation, the SEC moved to dismiss the claims of all respondents. *R 41, 43.* Following a hearing, the District Court entered its opinion and order dated January 20, 1982, *R 61,* granting the SEC's motion to dismiss the equitable claims of the respondents, but denying its motion to dismiss their respective legal claims.

The District Court reasoned that because respondents were subject to outstanding SEC subpeonas duces tecum, respondents could refuse to comply with those subpoenas and they would then have the opportunity to object to the abuse of the SEC's subpoena authority at a subsequent subpoena-enforcement hearing. Thus, the District Court concluded that respondents would have an adequate remedy at law through the subpoena-enforcement proceeding and declined to grant equitable relief prior thereto. *R 61.*

In so concluding, the District Court stated that its "sole concern at present is whether subpoenas still outstanding, and the SEC's general investigation of the parties, is subject to preemptive attack as a matter of equity." *(Pet. App. 24a).*

2. *The SEC Avoided the Subpoena Enforcement Hearing.*

As forecast by respondents to the District Court, *R 101,* the SEC brought no subpoena enforcement action against respondents. Instead it continued after the January 20, 1982, Order to issue an untold number of administrative subpoenas to third persons. In so doing, the SEC completely circumvented and thwarted respondents' so-called "adequate remedy at law."

Indeed, the District Court noted at a subsequent hearing on March 25, 1982, that the SEC had "waged an aggressive investigation, issuing numerous subpoenas" to third parties

since the previous hearing on January 20, 1982. *R 104.*

Following the January 20, 1982, District Court hearings, the SEC continued to issue numerous third-party subpoenas without Magnuson's knowledge and beyond the scope of the FOI. Moreover, by use of these third-party subpoenas, the SEC sought and obtained documents and information to which Magnuson had previously objected as beyond any legitimate purpose of the FOI and, therefore, beyond any proper use of the subpoena power conferred by the FOI.

Consequently, respondents Magnuson and O'Brien again urged the District Court to require the SEC to give them notice of the issuance of third-party subpoenas so that the SEC could not "end run" a subpoena enforcement hearing, and emasculate the adequacy of their remedy at law, and so that respondents could protect their rights in the absence of such a hearing. *R 68.*[11]

On March 25, 1982, the District Court declined to order notice. *R 104.* But in so doing, the court stated:

> "The natural query at this junction is what protections exist for the ostensible 'target' of an investigation if he is *not* aware of process outstanding against third parties. Plaintiffs suggest that the only effective remedy would be to require notice to those under investigation whenever such process is issued. The argument is not without appeal." *R 104.*

The District Court also expressed concern with its ruling:

> " . . . I cannot say with certainty that this heretofore unresolved question could not be determined otherwise on appeal. The issue is intriguing, eminently arguable, and certainly substantial in the sense that the questions raised should be authoritatively determined on appeal." *R 104.*

Although the District Court did not order notice of the issuance of third-party subpoenas, it did grant a stay of fourteen (14) days enjoining the SEC from enforcing any outstanding process to allow the question of third-party

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[11] Respondents first made the Court aware of their objection to third-party process beyond the scope of the FOI at the first hearing before the Court on September 28, 1981. *Tr. 37, 77, R. 160.*

notice to be brought to the immediate attention of the Ninth Circuit. *R 104.*

Of concern to the District Court and respondents was that in the case of third-party subpoenas, the third party had no incentive either to inform the target of the outstanding subpoena or to challenge its validity in District Court. For example, if the subpoenaed third party is a broker and thus regulated by and dependent upon cooperation with the SEC for his livelihood, he cannot safely afford to question the validity of the subpoena or the scope of the information or documents sought thereby. He is simply going to turn over all requested information, often without even informing his customer that he was subpoenaed out of fear of SEC reprisals. Because there is no incentive for a third-party witness not to comply with a subpoena, it can readily be seen how an SEC investigation, relying primarily on third party subpoenas can evade judicial scrutiny even when the subpoenas admittedly exceed the scope authorized by the FOI.

A timely appeal was subsequently taken by the Magnuson respondents. *R 105.*

D. The Decision of the Ninth Circuit Protected Respondents' Rights.

The Court of Appeals reiterated the long-standing position of this Court that the targets of agency investigations were entitled to have the investigation conducted in good faith and in conformity with their legal rights. On the record before it, the Court of Appeals reasoned that notice to the targets of the investigation of third-party subpoenas was essential in order for the targets to have the opportunity to protect their rights. It concluded that the respondents should have been given notice by the SEC of subpoenas directed to third parties arising out of its investigation of the respondents.

The decision of the Court of Appeals is based on this Court's decisions in *United States v. Powell,* 379 U.S. 49 (1964), and *Reisman v. Caplin,* 375 U.S. 440 (1964), and effectuates the statutory intent of §§19(b), and 22(b) of the Securities Act of 1933, 15 U.S.C. 77s(b), and 77v(b), in §§21(b) and (c) of the Exchange Act of 1934, U.S.C. 78u(b), 78u(c), as well as the Commission's own regulations issued thereunder.

V

SUMMARY OF ARGUMENT

The Magnuson respondents do not contend at this time that the SEC lacked reasonable cause to issue the subject FOI as to them or that the SEC lacks in this case the right to investigate potential securities law violations. The Magnuson respondents do not object to legitimate subpoenas issued for the purpose of investigating the particular transactions subject to the FOI. Nor do they complain of administrative depositions of third persons so long as they are conducted within the scope of the FOI.

On the other hand, because the SEC was conducting an ongoing investigation by use of subpoenas requesting information and documents far beyond the scope of the FOI and therefore without Congressional authority, and because the SEC was obtaining such information and documents through the use of subpoenas, the Magnuson respondents sought notice of third-party process in order to have the opportunity to address the SEC's improper conduct in the appropriate forum.

Faced with the record before it, the Ninth Circuit properly ruled that notice of the issuance of third-party subpoenas by the SEC in this investigation should be given to the respondents. The ruling is consistent with Congressional legislation and the case law of this Court.

Congress legislated that SEC subpoena authority is limited to the scope and extent of the FOI issued by the Commission. Subpoenas may be used to compel testimony and production of records only for those certain transactions under investigation as defined by the FOI. 15 U.S.C. §§77s(b), 78u(b).

This Court has often held that members of the public have a right not to be investigated by federal agencies acting outside their authority. Moreover this Court has observed that targets of agency investigations may have certain remedies in the event of the abusive use of process by an agency in an investigation. Targets may seek to restrain compliance with third-party process and move to intervene in an enforcement hearing concerning third-party process in order to attack the same on any appropriate grounds. *Reisman v. Caplin*, 375 U.S. 440 (1964).

This Court has also held that members of the public are entitled to agency good faith in the use of investigative process. *United States v. Powell,* 379 U.S. 48 (1964). The issuance of third-party subpoenas, in violation of the good faith requirement of *Powell* violates a protectable interest of the party under investigation. This Court, in *Powell,* forbade judicial enforcement of an SEC subpoena issued in bad faith. This prohibition protects the rights of both the party subpoenaed and those parties affected by the subpoena to be free from agency compulsion beyond an agency's authority, purpose, or need. This Court has long recognized that interest. *See, e.g., Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186 (1946); *United States v. Morton Salt Co.,* 338 U.S. 632 (1950).

The target of an SEC investigation is aggrieved by every violation of that interest, whether the SEC directs the bad-faith subpoenas to him or to third parties, for it is information about him and his affairs that the abusive investigation demands, exposes and uses.

The Ninth Circuit correctly held that the subpoena enforcement action is inadequate to remedy violations of the target's interest committed through abusive third-party subpoenas, unless the target knows of the subpoenas. Since *Reisman v. Caplin,* 375 U.S. 440 (1964), courts have recognized the target has a real and practical problem. No one can challenge third-party subpoenas of which he is unaware. In this case, where the targets have alleged and have made a showing of abuses that if proven would warrant denial of subpoenas at enforcement proceedings, the Ninth Circuit correctly held that notice is required to assure that those proceedings will afford an adequate remedy.

The Court of Appeals had the equitable power to order notice. *Hecht Co. v. Bowles,* 321 U.S. 321 (1944). Additionally, the court's inherent power to protect against abuse of its process supported the notice order. *United States v. Powell,* 379 U.S. 48 (1964).

The decision of the Ninth Circuit creates no new rights or remedies. It does nothing more than provide a mechanism whereby a known target of an SEC investigation will be provided an opportunity to apply to the appropriate forum in a timely manner to seek the right of intervention recognized

by this Court in *Reisman v. Caplin, supra.*

The Ninth Circuit's decision does not burden agency investigations. The notice requirement merely affords targets an opportunity to question the process on appropriate grounds. *Reisman v. Caplin, supra.* Therefore, the decision of the Circuit Court should be affirmed.

VI

ARGUMENT

A. The Appellate Court Correctly Held That Notice Should Be Given to Targets of the Issuance of Third-Party Subpoenas in an SEC Investigation to Ensure the Adequate Protection of a Target's Rights.

The Ninth Circuit correctly ruled that a target of an SEC investigation had a "right to be investigated consistently with the *Powell* standards." 704 F.2d, at 1068, 1069. The Court of Appeals further correctly concluded that "subpoena enforcement proceedings do not afford targets an adequate legal remedy unless the agency notifies them of the identities of the subpoenaed third parties." 704 F.2d, at 1067.

In so doing, the Court of Appeals recognized the interest of targets in receiving notice of third-party subpoenas and realized that subpoena enforcement proceedings will not adequately remedy agency violations of this interest absent notice of third-party subpoenas. Without notice, a target's rights simply cannot be protected.

1. *SEC Has Limited Subpoena Power.*

Congress has granted the SEC "limited authority" to undertake investigations. *United States v. Sells Engineering, Inc.*, ___ U.S. ___, 77 L. Ed.2d 743 (1983). The SEC may exercise its authority only in compliance with statutory standards and judicial decisions. *United States v. Powell, supra.*

In this connection, Congress has given the SEC authorization to use coercive process (subpoenas) as an aid to its investigations only after the Commission itself issues an FOI which establishes the scope of the investigation and

thus the scope of subpoena power.[12] 15 U.S.C. §§77s(b), 78u(b). That being so, an SEC administrative subpoena may be issued only as authorized by law. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S 186 (1946).

2. *Subpoenas Can Only Be Issued Within the Scope of the FOI.*

One of the requirements that the agency must follow is to limit the use of subpoenas in its investigation to those matters and transactions identified in the FOI. Congress has made this requirement abundantly clear:

> "Subpoenas are enforceable only to the extent that they seek information which is reasonably relevant to matters *within the scope* of the Formal Order of Investigation. *Should the staff uncover information indicating the advisability of pursuing possible violations not embodied within the scope of the Formal Order, it must return to the Commission and seek an amendment to the order.* [H.R. Rep. No. 1321, 96th Cong., 2nd Sess. 2 (1980) reprinted

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[12] In passing legislation to enact the Right to Financial Privacy Act of 1978, amendments as applicable to the SEC, 15 U.S.C. §78u(h), Congress clearly contemplated the scope of the use of compulsory process by the SEC:

> "While the Commission's staff may make preliminary inquiries concerning possible violations of the federal securities laws, *the staff has no authority to issue compulsory process without Commission approval.* When it appears that the issuance of process may be necessary to develop the facts concerning a matter under inquiry, the staff brings the matter to the Commission's attention. If the Commission, by majority vote of its five congressonally-approved members, concurs with the staff's assessment, a formal order of investigation issues. This order sets forth, among other things, the names of the specific staff members authorized to issue subpoenas in conjunction with the investigation and the statutory authority pursuant to which the Commission has adopted the order. *Subpoenas are enforceable only to the extent that they seek information which is reasonably relevant to matters within the scope of the formal order of investigation. Should the staff uncover information indicating the advisability of pursuing possible violations not embodied within the scope of the formal order, it must return to the Commission and seek an amendment to the order."* H.R. Rep. No. 1321, 96th Cong., 2d Sess. 2 (1980), reprinted in [1980] U.S. Code Cong. & Admin. News 3877 n.2 (Emphasis added).

in [1980] U.S Code Cong. & Admin. News 3877 n.2 (Emphasis added).]"

The SEC concedes this requirement in its brief. *(Brief Pet. p. 12-13).*

Congress, having addressed the issue of the scope of SEC subpoena power, created and defined rights in members of the public as to the manner in which the SEC may investigate through the use of subpoenas.

This Court has often held that the federal courts have power to prevent the deprivation of a Congressionally-granted right. *See, e.g., Leedom v. Kyne,* 358 U.S. 184 (1958).

A cursory review of some of the third-party (and target) subpoenas issued in this case clearly demonstrates that subpoenas are being used in an attempt to uncover information concerning transactions well beyond the time, scope and nature of the FOI. *See, e.g., R 102 Ex. E-X.* Transgression of statutory authority by improper use of subpoenas has permeated this entire investigation. *Id.*

3. *Subpoenas Can Only Be Issued in Good Faith.*

Agency subpoenas must seek information within statutory limits and must be issued in good faith. This Court described this good faith requirement in *United States v. Powell, supra*[13], in determining whether or not to enforce agency process, as follows:

> "Reading the statute as we do . . . [the agency] must show [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the Commissioner's possession, and [4] that the administrative steps required . . . have been followed . . . " 379 U.S at 57-58.

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[13] Although the decision in *United States v. Powell,* 379 U.S 48 (1964), concerned issuance of process by the Internal Revenue Service, it is generally agreed that the principles of that case, together with other decisions of this Court, *e.g., Reisman v. Caplin,* 375 U.S 440 (1964), and *United States v. LaSalle National Bank,* 437 U.S. 298 (1978), apply to SEC subpoenas as well. *See SEC v. ESM Government Securities Inc.,* 645 F.2d 310 (5th Cir. 1981).

4. *The Court is the Guardian of the Public to Ensure That Agency Process is Properly Issued.*

Agency process is not self-executing. See 15 U.S.C. §§77v(b), 78u(c). Rather, enforcement is left by Congressional statute to the federal courts. The reason is clear:

> [The SEC] is not an historic guardian of individual liberties. Instead, its two functions are investigation of possible illegal activities, and adjudication of alleged violations. *Hannah v. Larche*, 363 U.S. at 446-47, 80 S. Ct. at 1516-1517. The SEC is not, like the grand jury, a protector of individuals against government prosecution." *SEC v. ESM Govenment Securities, Inc.*, 645 F.2d 310, 312-313 (5th Cir. 1981).

This Court, in many decisions, has recognized that it is up to the courts to fashion remedies and mechanisms to ensure protection of an investigated person's rights.[14]

Courts are thus the guardians of the public to ensure that agency process is properly issued and investigations are properly conducted.

5. *A Target of an Agency Investigation Has a Protectable Interest in Third-Party Process.*

A target of an agency investigation has long been held by this Court to have a protectable interest in third-party process to ensure that the same is issued in good faith and according to statutory authority. An analysis of the law which has developed regarding the interests of an investigated person in third-party process can begin with this Court's decision in *Reisman v. Caplin*, 375 U.S 440 (1964).

In *Reisman*, attorneys for the taxpayers under investigation sought declaratory and injunctive relief against the Internal Revenue Service and an accounting firm which had been assisting the taxpayers' attorneys in tax litigation. A summons had been issued by the IRS to the accounting

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[14] Courts have consistently recognized that equitable relief is required where an agency exercises its authority in excess of its statutory authority. *Coca-Cola Company v. FTC*, 475 F.2d 299 (5th Cir. 1973).

firm directing production of all papers relating to the taxpayers. The taxpayers' attorneys alleged that the summons was unenforceable since it would amount to an unlawful appropriation of the attorneys' work product for trial preparation and an unreasonable seizure requiring the taxpayers to incriminate themselves, all resulting in the denial of effective assistance of counsel.

In *Reisman*, the case reached the Court at a stage when the only affirmative action taken by the IRS was the issuance of a summons requiring the taxpayers' accountants to appear before a hearing officer. There had been no statement by the accountants that they would not voluntarily appear and produce the documents. Consequently, no summons enforcement proceeding had been initiated. In *Reisman*, the government conceded that a witness or any interested party may attack a summons before the hearing officer (or in court) asserting their constitutional or other claims. This Court stated "we agree with that view." *Id.* at 445.

This Court noted that the recipient of an IRS summons (like the recipient of an SEC subpoena) can refuse to testify or produce documents and the agency has no independent power to enforce compliance or to impose sanctions for noncompliance. Rather, the agency must proceed to Federal District Court for enforcement. The *Powell* Court noted "any enforcement action under this section would be an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness." *Id.* at 446. The Court further observed that either before an IRS hearing officer or at an enforcement hearing before a Federal District Court judge, the witness or any party affected by the disclosure (i.e., the target of the investigation) may challenge the summons on any appropriate ground, including the defense that the materials were being sought for an improper purpose. *Id.* at 449. In addition, this Court stated:

> "Third parties might intervene to protect their interest, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene." *Id* at 449.

In finding that the courts below acted properly in dismissing equitable claims to enjoin the process and leaving the

case to be decided at an enforcement hearing in Federal District Court, this Court commented upon the situation where a witness indicates that he will voluntarily turn papers over to an agency as follows:

> "If this be true, either the taxpayer or any affected party might restrain compliance, as the Commissioner suggests, until compliance is ordered by a court of competent jurisdiction. This relief was not sought here. Had it been, the Commissioner would have had to proceed for a compliance, in which event the petitioners or the Bromleys (taxpayers) might have intervened and asserted their claims." *Id.* at 450.

Thus, in *Reisman*, this Court recognized the interest of a person affected by administrative subpoenas directed to a third person and further recognized that those affected persons may seek to restrain compliance and to intervene and challenge the subpoenas on any appropriate grounds.[15]

In the next term following the decision in *Reisman*, this Court was again asked to review the rights of affected parties in connection with administrative process in *United States v. Powell*, 379 U.S. 48 (1964).

In *Powell*, the IRS was investigating the tax liability of a taxpayer. In so doing, the IRS issued a summons directed to Powell, the president of the taxpayer, requesting production of certain of the taxpayer's records. Powell refused to comply. A proceeding for judicial enforcement of the administrative summons was then initiated by the IRS. The taxpayer joined in the proceeding. The lower court allowed limited review of the records and the taxpayer and its president appealed. The Court of Appeals reversed the judgment and certiorari was granted so that this Court could resolve

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[15] This Court has never provided a complete list of the appropriate grounds referred to in *Reisman*. Such appropriate grounds, however, include the Fifth Amendment privilege against self-incrimination, *see Couch v. United States*, 409 U.S 322 (1973); the attorney-client privilege, *Reisman v. Caplin*, 375 U.S at 449; free exercise of religion, *United States v. Holmes*, 614 F.2d 985 (5th Cir. 1980); freedom of association, *United States v. Citizen State Bank*, 612 F.2d 1091 (8th Cir. 1980); and Fourth Amendment claims, *United States v. Bank of Commerce*, 405 F.2d 931 (3rd Cir. 1969).

a conflict among the Circuits concerning the standards the IRS must meet to obtain judicial enforcement of its summonses. Thus, the decision in *Powell* concerned both the recipient and the affected party's interests and rights concerning agency process.

In *Powell*, the Court held that in order to be entitled to enforcement of agency process the agency must show good faith by demonstrating the following:

> "[The agency] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." *Id.* at 57-58.

At any such hearing on enforcement, the affected party may challenge the summons on any appropriate ground. *Id.* at 58. The agency must meet the test of good faith set forth in *Powell*, and the affected person may challenge agency process on any appropriate ground including abusive process issued for any purpose reflecting adversely on the good faith of the particular investigation. *Id.* at 58.

The *Powell* Court did not provide a complete analysis of every instance of abusive process which would render agency process invalid. However, the court noted that such abuse would take place if the agency process were issued for purposes other than those reflecting the good faith of the particular investigation. *United States v. Powell*, 379 U.S. at 58. Indeed, this Court noted in *United States v. LaSalle National Bank*, 437 U.S. 298 (1978), that the indication of various statements concerning abusive process in *Powell* was not meant to be exhaustive. "Future cases may well reveal the need to prevent other forms of agency abuse of Congressional authority in judicial process." *Id.* at 318 n.20.

6. *Notice of Third-Party Process Should Be Given to Targets of SEC Investigations.*

a. Balancing of Equities Favors Notice.

Congress has placed the judiciary between agency process and enforcement of the same. *United States v. Bisceglia*, 420 U.S. 141, 151 (1975).

This Court has insisted that administrative agencies issue process in good faith because that is the minimum conduct required in the balance the Court has struck between the competing interests at stake in the enforcement of administrative subpoenas. In the interest of effective enforcement of Congressional policies, the Court has recognized Congress' power to authorize proper agency investigations. But mindful that any investigation is an intrusion into private affairs which creates a burden on the lives and resources of private parties, the Court has prohibited judicial enforcement of agency subpoenas that seek to compel information outside the agency's investigative authority.

The private interests being protected are the "interests of men to be free from officious intermeddling." *Oklahoma Press Publishing Co. v. Walling, supra,* 327 U.S., at 213.

The requirements of this Court protect those interests by requiring a legitimate purpose to the investigation, relevancy in the information sought, adherence to the agency's own procedures, a need behind the inquiry, *United States v. Powell, supra,* and, beyond these specifics, avoidance of any action that would abuse the subpoena power entrusted by Congress to the agencies.

Thus, a subpoena issued in violation of *Powell* violates the private interests of those affected by it; an abuse arises at the moment the coercive process issues; and affected parties are burdened with illegitimate agency demands. The courts therefore refuse to enforce such subpoenas.

The target's affairs are exposed by an unauthorized governmental inquiry; the target suffers inevitable publicity; loss of time and energy; and suspicion and doubt are cast among his customers, colleagues, and personnel. It is against the target that the agency may use information obtained in disregard of the checks on its own administrative procedures. The target suffers these abuses from any bad-faith subpoena issued in the investigation of him. Whether the bad-faith subpoena is directed to him or to a third party, *any* violation of *Powell* violates the target's interest in freedom from "officious intermeddling."

In the event a target is the recipient of a subpoena or other agency process and refuses to comply, the appropriate remedy is a court-held enforcement hearing.

In the usual case, the recipient of an administrative subpoena may not bring an independent action seeking to quash the subpoena or test the legality of the underlying investigation, and can only make such a motion in response to a subpoena-enforcement action brought by the agency issuing the subpoena. *See, e.g., Reisman v. Caplin*, 375 U.S. 440 (1964). Similarly, there are many circumstances in which those subjected to an agency investigation must await final agency action before challenging the conduct of the investigation or other agency proceedings. *See, e.g., SEC v Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118 (3d Cir. 1981). The rationale in such instances is that normally the private party has an adequate remedy at law to challenge the action in a subsequent subpoena enforcement proceeding or in an appeal from a final agency decision. This is clearly not the case in the instance of third-party process.

In *Reisman*, the taxpayers knew about the third-party process. But in cases where the target does not know about the third-party process, there is a need for the Court to identify a mechanism to give the target an opportunity to raise his contentions in the appropriate forum on any appropriate ground. Thus, the Court must make the right of a target to intervene and present his case real and not illusory.

The SEC may not act in bad faith or outside of its statutory authority. Particularly, in cases such as this where a showing of agency bad faith and extralegal activity has been made, the balance of equities clearly favors the requirement of notice.

b. As to Excessive Third-Party Subpoenas, No Adequate Remedy Exists to Protect the Target's Interest Without Notice of the Issuance of Third-Party Subpoenas.

This Court held in *Reisman v. Caplin*, 375 U.S. 440 (1964), that a subpoena-enforcement proceeding is an adequate remedy at law to subpoena recipients and other affected parties raising challenges to a subpoena. The lower Federal courts ever since have recognized the question that *Reisman's* holding necessarily raises: if the "other affected parties" have their remedy only at an enforcement pro-

ceeding, must not the affected parties receive notice of the subpoena for that remedy to be adequate? In the case of abusive third-party subpoenas, how can the investigated person's rights be protected if he has no notice of the third-party subpoena? The Ninth Circuit struggled with those questions in this case and decided that notice must be given to make the enforcement proceeding an adequate remedy to the target who is injured by third-party subpoenas in violation of *Powell*.

If abusive third-party subpoenas were issued unknown to Magnuson and the third party voluntarily complied with the same, Magnuson has no way to guarantee or enforce his rights; he has no means to challenge the abusive subpoenas issued to third parties without his knowledge.

In the instant case, the Court of Appeals did not involve itself in agency investigations. The Court set forth no ruling affecting who, what, why, when or how members of the public may be investigated by the SEC. The Ninth Circuit created no new rights in the Magnuson respondents. Rather, its decision merely provided a mechanism by which the rights vouchsafed by Congress and implemented by this Court in *Reisman*, *Powell* and *LaSalle* might be meaningful. In so doing, the appellate court properly exercised its equity jurisdiction.[16]

The appellate court had the inherent power to protect its process and, as such, was empowered to assure the adequacy of the legal remedy. *Powell* invoked the same protective power in admonishing that a "court may not permit its process to be abused." 379 U.S., at 58.

Thus, the Court of Appeals had all the power necessary to order notice. As an exercise of equity and in protection of its own process, the court fashioned a decree to assure that the

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[16] The hallmark of equity jurisdiction is flexibility. The Court stated in *Hecht Co. v. Bowles*, 321 U.S 321, 329 (1944):

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interests and private needs as well as between competing private claims."

subpoena enforcement proceeding would afford an adequate remedy.[17]

The notice mechanism implements what this Court and Congress have already established; namely, the right of a target to seek judicial review of agency subpoenas. The Court of Appeals merely ensured that the right to attack abuses and lack of good faith would not vanish through lack of knowledge. In the absence of notice, this right becomes meaningless.

B. The "Parade of Horribles" Argued by the SEC Refers to Mere Agency Convenience and Does Not Justify Reversal in This Case.

By requiring notice the Court of Appeals merely insured compliance with §§19(b) and 22(b) of the Securities Act and §§21(b) and 21(c) of the Exchange Act, and followed the lead taken by this Court in *Reisman*, *Powell* and *LaSalle*. If no notice is required to be given to targets, the SEC can evade Congressionally-mandated safeguards for prevention of agency abuse: judicial review of subpoenas at an enforcement hearing.

Nevertheless, the SEC raises a "parade of horribles" listing far-fetched ways by which targets with notice could obstruct agency investigations. *(Brief Pet. 27-35)*. This is merely speculation, utterly without support in the record before the Court.

The SEC's claim that notice will corrupt and delay investigation is patently exaggerated. On the contrary, prior notice will not unduly burden *lawful* SEC investigations.

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[17] The SEC argues that neither the Constitution nor the securities laws support the notice order decreed by the Court of Appeals. *(Brief Pet. 11-16)*. The SEC's brief also discusses the Right to Financial Privacy Act of 1978, *12 U.S.C. 3401, et seq. (Brief Pet. 6, 9, 20-21)*. However, nothing in the legislative history of the Act suggests that Congress intended to restrict or confine the federal court's equitable powers. Only the clearest statement of such an intention would justify such an interpretation of the Act. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). The SEC does not suggest that Congress had any such intent in the Act. Accordingly, the Act is irrelevant to the decision of this case, except as it suggests that notice is a workable device acceptable to Congress to protect interests jeopardized by abusive administrative subpoenas.

Notice is particularly appropriate where, as in this case, a showing has been made of SEC bad faith. The SEC itself holds the greatest control over any possibility that prior notice will burden an investigation. As long as the SEC conducts its investigations consistently with the *Powell* standards, prior notice will not by itself create any new rights in a target nor any new burdens upon the SEC.

Notice will not cause undue delay. Presumably each SEC subpoena bears a return date by which the recipient is to comply if he intends to do so. Before that date, the SEC has no ground to complain of delay. Notice need not extend the return date. With or without notice given, the SEC can seek enforcement as promptly as it chooses after the return date. Notice therefore injects no more delay into an investigation than the mechanics of the subpoena itself require.

Nor will notice result in the undermining of witnesses or evidence as feared by the SEC. The court that has the power to compel enforcement is fully able to protect against abuses by the target. The court can enter such protective or limiting orders as the circumstances dictate. The court should not indulge, however, in the presumptions of lawlessness that the SEC allows itself. *(Brief Pet. p. 27-29)*. There is no basis for concluding in the abstract that targets will obstruct investigations. A court faced with specific SEC allegations of misconduct may tailor such relief as is appropriate.

Notice will not engender needless litigation; notice will only empower a target to learn whether the SEC is complying with the *Powell* standards. On the other hand, targets intent on obstruction are likely to obstruct with or without notice. The SEC has obtained relief from obstruction in the past, and will again in the future. Notice does not present so great a risk of obstruction as to outweigh the need to assure protection of the target's right.

Besides, in any investigation where a target learns of the third party process by some other means, the same "parade

of horribles" is no less a possibility.[18]

In this case, the SEC has never disputed that it is using subpoena power to investigate matters other than those contemplated by the FOI. A clearer case for notice would be difficult to find.

It is up to the federal courts to fashion the appropriate mechanisms to ensure that a person's rights will not be abused. To effectively control abuse of process by the SEC, the target of the investigation must be able to knowingly exercise his rights.

To deny targets notice of agency process issued to third parties, especially in the circumstances which obtain in this case, is to deny *all* targets the ability to assert their rights to be investigated consistently with the good faith standards set forth in *United States v. Powell*, 379 U.S. (1964), and to render useless the Court's holdings in *Reisman* and *Powell*.

VII

RELIEF REQUESTED

The decision of the Court of Appeals more fully implements those rights and should be affirmed.[19]

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[18] The SEC's "parade of horribles" is not new. The same litany was urged by the Chairman of the Securities and Exchange Commission before Congress in an unsuccessful attempt to exempt the SEC from the diclosure provisions of the Right to Financial Privacy Act of 1978, *12 U.S.C. §3401 et seq. See* H.R. Rep. No. 1321, 96th Cong., 2d Sess. 2 (1980) *reprinted* in [1980] U.S Code Cong. & Admin., News 3886-3889.

[19] The Privacy Protection Study Committee of Congress noted "post-notification . . . " is a useless exercise. What privacy is there to protect once a government agency has the information? Subsequent notice seems to add insult to injury." *See* [1978] U.S. Code Cong. & Admin. News 9376.

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